

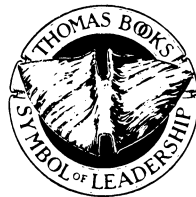
**THE POLICE OFFICER'S GUIDE
TO CIVIL LIABILITY**

THE POLICE OFFICER'S GUIDE TO CIVIL LIABILITY

By

CARL J. FRANKLIN

*B.A. (Law Enforcement Admin.) (University of Oklahoma)
Juris Doctor (University of Oklahoma)
State of Oklahoma Council of Law Enforcement Education and Training
University of Oklahoma Police Department
Norman Police Department, Norman, Oklahoma
Oklahoma City Police Department, Oklahoma City
Oklahoma Reserve Law Officers Association
American Bar Association
Oklahoma Bar Association*



CHARLES C THOMAS • PUBLISHER

Springfield • Illinois • U.S.A.

Published and Distributed Throughout the World by

CHARLES C THOMAS • PUBLISHER
2600 South First Street
Springfield, Illinois 62794-9265

This book is protected by copyright. No part of
it may be reproduced in any manner without
written permission from the publisher.

© 1993 by CHARLES C THOMAS • PUBLISHER

ISBN 0-398-05881-4 (cloth)

ISBN 0-398-06130-0 (paper)

Library of Congress Catalog Card Number: 93-4935

*With THOMAS BOOKS careful attention is given to all details of manufacturing
and design. It is the Publisher's desire to present books that are satisfactory as to
their physical qualities and artistic possibilities and appropriate for their particular
use. THOMAS BOOKS will be true to those laws of quality that assure a good
name and good will.*

*Printed in the United States of America
SC-R-3*

Library of Congress Cataloging-in-Publication Data

Franklin, Carl J.

The police officer's guide to civil liability / Carl J. Franklin.

p. cm.

Includes index.

ISBN 0-398-05881-4. — ISBN 0-398-06130-0 (pbk.)

1. Police—Malpractice—United States. 2. Actions and defenses—
United States. I. Title.

KF1307.F73 1993

346.7303'3—dc20

[347.30633]

93-4935

CIP

TO MY WIFE

*For the Long Hours on Shift, the Longer Hours in Study,
and for All the Support You Have Given*

FOREWORD

Police departments must take a pro-active approach to civil liability exposure, just like they do with criminal activity. If you wait until officers and departments become defendants to civil action, you are forced to be reactive. Unfortunately, this is the situation in many departments that learn through costly lawsuits what the law is or why a certain policy or practice fails to meet the expectations of the court.

Some of the major concerns of police administrators must be the policy and procedures of officers during high-speed pursuits, use of force during arrest, and the laws of search and seizure. Everyday departments are being sued for serious allegations in both federal and state courts. Each department should conduct internal inspections to ensure that officers are properly trained and are following the department's policy and procedures.

Often, policies are found to be outdated or no longer in use and should be updated. It is much more pro-active to complete this inspection before you have a lawsuit than to have experts from across the country come in and inspect your department during the course of the trial. One of the best defenses your department can have is a sound internal review process to monitor and improve its policy, training, discipline, and supervision.

This pro-active approach must involve the entire department and will require some assistance from a police legal advisor or other attorney in reviewing current policy and procedures to identify areas of change and additional training. Documentation of the review process and accurate accounting of officer training is very important to quickly show that your department does have a pro-active and professional approach to internal inspection and control.

Often, internal controls fail to recognize the citizen perceptions of officer contacts that can be useful indicators of problems external to the department. Citizen complaints should be closely monitored and investigated to compare to internal inspections. Common areas of concern are

often identified that are problems both internal and external to the department. Citizen complaints based upon perceptions that differ from the officer are difficult to investigate and often, when unresolved, lead to civil action against the officer and the department. One of the tools currently available to protect the officer are low-cost audio and video equipment. This equipment not only provides additional evidence when needed for prosecution, but it also protects the officer by documenting the citizen interaction and circumstances that lead to probable cause for arrest or search.

Civil liability will continue to be a major law enforcement issue and should be a concern in every policy, procedure, evaluation process, and training program. This book takes an important step in filling some of the gaps left in today's training, and should be the foundation upon which police civil liability training is based.

CHIEF DAVID BOYETT
Norman Police Department
Norman, Oklahoma

FOREWORD

How can it be that lawyers are having greater impact than laws in shaping American police procedure and administration as we grind toward the twenty-first century? It happens because of the bull market in civil litigation aimed at law enforcement in America and a failure to prepare officers to understand its dynamics. The nature and scope of the problem is set out in cogent terms by Carl J. Franklin in his forthright and timely book, *The Police Officer's Guide to Civil Liability*.

Franklin, a former lawman, was typical of hundreds of thousands of American police officers. He was thoroughly trained by the Oklahoma City Police Department for more than a year, and was made fully competent to do the job and to do it well. And he did! But he had had no preparation for the trauma that hit him like a ton of bricks when he was named in a civil rights lawsuit in which he was characterized in hot and absolutely false terms. Among other deeds Franklin was alleged to:

... not know the constitutional rights of the Plaintiff, or if he knew said rights he intentionally deprived said Plaintiff of such rights...

... have the propensity for violence and intentionally deprived the Plaintiff of his constitutional rights...

... was careless, abusive, grossly negligent and lusted in abusing and oppressing prisoners...

Reading about yourself in these terms sure makes your day!

You know that this is baloney, *Alice in Wonderland* fiction and totally false, but someone is alleging that this is what YOU did. Dumbfounded, you wonder where to turn now that you have been thunderstruck, shattered, degraded.

As a police officer, you should have been made to understand, in lay terms, the nature of civil rights lawsuits, how they come about, the games that are played as the suits run their course and of the hurt and humiliation that accompany litigation. And police administrators and trainers

should understand how urgent it is that officers be made to understand just what lawsuits are. This is why Carl Franklin's book should be a part of recruit training across America so that officers will no longer be befuddled by the publicity and terror of facing a civil rights lawsuit. Franklin's book achieves that goal in a straightforward fashion.

In summary, Carl Franklin's book declares that to successfully defend oneself from a civil lawsuit an officer must go about doing one's job in accord with the department's rules, regulations and policies; perform as trained to do each task and do so in good faith; keep good notes and records of each event; and have faith that helping others within guidelines is in everyone's best interest. Doing all these things, none of which is inconvenient or unconventional, will result in a higher level of police service and stronger protection from police civil liability.

PROFESSOR SAMUEL CHAPMAN

University of Nevada

Sparks, Nevada

PROFESSOR, LAW ENFORCEMENT ADMINISTRATION (RETIRED)

University of Oklahoma

Norman, Oklahoma

PREFACE

In 1976 I took my first job in law enforcement. I became a Community Service Officer for the University of Oklahoma Police Department, and was assigned to serve as a dispatcher. I received three days of on-the-job training and was turned loose on the world.

Within a couple of years I found myself sitting behind a desk at the training academy for the Oklahoma City Police Department. I was just ten days past my twenty-first birthday, and I was learning to be a police officer. I spent eighteen weeks in the academy, and learned everything a modern police academy could teach a young recruit. I would spend another seven months riding with senior officers learning how to be a cop. What no one had bothered to tell me, though, was how important police civil liability would become to me within the next year.

I was at work when the lawsuit came. The first page was an awful sounding document. It was a *Subpoena Duces Tecum*. This alone made me cringe, but behind it was even more. The next page was the *Summons* and then came twelve pages of horror. I had been accused of “brutally beating a handcuffed prisoner about the head and shoulders until he lost consciousness.” I was also accused of “violating section 1983 of the Civil Rights Act.” I was being sued for more than two million dollars, and I had been on the job for less than a year.

The first thing I did? I panicked. I shuffled up to my sergeant with the paperwork in hand and thrust it upon him. “What’s this?” I cried. He laughed.

“Hey look, the rookie’s already being sued.” He cackled to the other sergeants in the office. Their attitude didn’t help. I was told that lawsuits were a part of the job. Get used to them, they insisted. “Call the city attorney the next day and he’ll take care of it.” I was told. Yet, no one seemed to be able to give any concrete explanations of what was happening. The fact was they simply didn’t know.

I worked the entire night in fear of that lawsuit, and things didn’t get much better the next day. I called the city attorney and told him what I

had received in my departmental mail box. I asked what a *Subpoena Duces Tecum* was and was told not to worry about it. No explanation. I was told the department would take care of it, but I was not convinced.

I read over the paragraphs in the lawsuit again and again. It didn't make any sense. I remembered the call, but the allegations in the lawsuit didn't match the facts of the case. How could I be sued for just doing my job? I simply did not understand, and there were few who seemed to be able to help.

I went over the whole incident again and again. It came out of an arrest I had made in my first two weeks on the job. We had been called to an economically depressed neighborhood near the stockyards section of town. The call had come in as a shooting, and when my training officer and I arrived we were met by a fifty year old man in his undershirt.

He told us that he had shot his brother during an argument, and as we entered the house we found the victim slumped in a chair with five bullet holes in his chest. Other officers quickly arrived, and before anything else happened one of the other officers commanded the suspect to put his hands on his head. The suspect refused and the officer stepped forward. The suspect raised his hand and the officer grabbed it. The fight was on.

During the struggle the suspect received a single cut to his forehead. He was quickly subdued without any punches being thrown. There were no other injuries to anyone else involved.

Since I was the rookie on the scene it was agreed that I should take credit for the arrest. It was also agreed that I would do all the paperwork. As a result my name appeared first on the reports and again on the lawsuit.

The murder was an open and shut case. The district attorney brought charges against the man and made an offer of 15 years in exchange for a guilty plea. The suspect refused and the case was set for trial. I testified at trial (my first major case) and the man was convicted of murder in the second degree. He got 25 years in prison instead of the 15 the DA had offered.

As I sat there looking at the lawsuit I wondered how such a thing could happen. The guy was guilty. He had gone to prison. How, then, could he sue me and the other officers. I learned very quickly how little I understood of civil liability. I had gone through a well respected training academy and received top notch training. Yet, I had no idea of what civil liability was or how much it could cost me for doing my job.

Things have not changed a lot since that fateful day in the late 1970s. The only real change has been in the number of lawsuits against the police. The other change is that I worked my way through law school. Since my graduation I have been active in helping officers understand their civil liability. This book is one way of continuing that work.

I've written this book from the perspective of a ten-year police veteran. It is written by a cop for cops. It is written to help the average cop understand and cope with a frightening area of today's society. It is also written to help current and future police administrators understand how to deal with civil liability. I hope it is put to good use, and especially hope that it helps you to better understand something that I did not the first time I was sued.

ACKNOWLEDGMENTS

I would like to thank the officers of the following departments for their assistance:

University of Oklahoma Department of Public Safety

University of Oklahoma Police Department

Norman Police Department, Norman, Oklahoma

Oklahoma City Police Department, Oklahoma City, Oklahoma

CONTENTS

	<i>Page</i>
<i>Foreword—David Boyett</i>	vii
<i>Foreword—Samuel Chapman</i>	ix
<i>Preface</i>	xi
<i>Acknowledgments</i>	xv
Section One	
Chapter 1—Introduction	5
Chapter 2—Why Police Officers Get Sued	9
Chapter 3—The Future of Police Civil Liability Suits	15
Section Two: Anatomy of a Police Liability Lawsuit	
Chapter 4—The Case	21
Chapter 5—The Initial Inquiry	27
Chapter 6—The Answer	55
Chapter 7—Discovery	75
Chapter 8—Adjudication Without Trial	99
Chapter 9—The Trial	111
Chapter 10—Post-Trial Procedure	147
Section Three	
Chapter 11—Early Foundations of Police Liability	157
Chapter 12—Tort Claims Against the Police: Prosecution, Exemptions, & Defenses	193
Chapter 13—Constitutional Issues	219
Chapter 14—Enforcing Constitutional and Statutory Claims Under Section 1983	227
Chapter 15—Qualified Immunity Issues	237
<i>Appendix—The Constitution of the United States</i>	245
<i>Index</i>	269

**THE POLICE OFFICER'S GUIDE
TO CIVIL LIABILITY**

SECTION ONE

Chapter 1

INTRODUCTION: WHAT THIS BOOK WILL DO FOR YOU

As the number of lawsuits against the police rise there has also been a growing need to train and educate police officers on the civil law. This is a basic survival necessity. Though different from the skills needed to survive a deadly shoot-out, having competence in the civil law can prevent an outcome just as devastating to a career as any gun battle. The financial and emotional drain caused by a civil lawsuit can often exceed the physical pain associated with a bullet wound.

As professionals, each of us knows of or has been directly involved in a civil lawsuit. We have seen the stress placed on officers and departments when these suits hit. Yet, many of today's officers still receive little training in the area of civil liability. The sad truth is that millions of dollars in loss and thousands of police lives could be saved with minimal training on civil liability. Such training produces a better prepared officer who can respond more appropriately to the needs of society. This training also helps to reduce the chances of suffering a loss in the civil court, and this is often the ultimate measurement for the worth of police training.

One of the broadest areas of neglect in police civil law training is in the realm of personal liability. Less than two percent of all police departments in the United States offer training on police civil liability.¹ Part of the reason for this neglect is the inability to offer substantive material on the topic. In addition, many training officers have little education on the topic themselves. To remedy this problem the training officer or police administrator must first educate himself and then offer quality material for all officers to use. This book will help to do just that.

This book is designed to be used as both an educational tool and a reference work for today's police officer. It is a book designed to be used

1. Franklin, *Must We Train in Civil Liability?* Oklahoma Municipal League, Mutual Assurance Group Report, Summer 1992.

in the college classroom, the academy training course, and the personal reference library. It is a combination civil justice text, road map to the civil justice system, and academic treatise on the basic law of police liability.

For the first time a comprehensive text has brought together the major topics in police liability. This book provides the maximum amount of material in the least amount of space. To accomplish this we have divided the book into three distinct sections. Beginning in this introductory section we will explore common theories on why police officers get sued. As part of this examination we focus on modern police practice and how it might affect the public's view of police civil liability. We will also examine how outside forces, such as the media, influence the public's willingness to sue the police.

In Chapter Three, we examine the future of police civil liability suits. Specifically we will explore the growing trends in police liability suits and where they might take us in the future. By examining past practices in police liability and future trends we can gain a better perspective of how to protect ourselves from civil liability.

Moving from the introductory section we will then turn our attention to the civil justice system itself. What makes this exploration of the civil justice system different from all others, though, is the way in which we study the system. We begin by creating a fictional case which we will follow through the court system from start to finish.

The best way to learn about the civil justice system is to apply it to something we already understand. With this in mind we create a fictional case that is a composite of cases involving one of the hottest topics in police liability today. We mold this topic and apply it to the intricacies of the civil justice system so that we can see exactly how a police civil liability case evolves.

We begin our understanding of the civil justice system by focusing on how a lawsuit begins. We will examine the steps a prospective plaintiff takes in deciding to bring a lawsuit against the police. We will examine the initial inquiry by the plaintiff's attorney as he builds the case for filing. We will then follow the case through the process of writing the lawsuit, filing it with the court, and serving the defendant police officer with a copy of the lawsuit and notice to appear in court.

At this point we will examine the civil suit from both sides as we detail the workings of the civil system. We will first look at what obligation the defendant police officer has when he/she receives the lawsuit. Can the

officer ignore the suit or must he/she take action to protect important civil rights. We will closely examine how a police officer works to defend against the civil lawsuit. We will also explore the need for a civil defense attorney, and how this affects the police officer.

A major portion of Section Two will detail the use of discovery in a civil lawsuit. We will examine the five tools of discovery and how they are used in preparing the case. An important part of this area is the use of discovery by both parties. We will see how discovery can be used to promote early settlement, gain legal high ground, and prepare for trial.

Moving from discovery we move into the shadowy world of civil trial. Few police officers have any knowledge of what a civil trial is like. Surprisingly, it is not all that different from the criminal trials most police officers are familiar with. The major difference is in the burden of proof. By taking our fictional civil case into a civil jury trial we can better understand the differences between civil and criminal law.

In the final portion of section two we will study what happens after a verdict is rendered in a civil case. As we will see, just because a jury has rendered a verdict does not mean the case is over. We will first examine the tools and tricks each side has at their disposal for setting aside or altering a jury decision. We conclude our study of the civil justice system with a brief look at appeals.

In the third section of the book we will study the basic law of police civil liability. We begin with the founding principles of police liability which are most common in today's courts. In Section Three we examine the law or torts as it might apply to police liability as well as civil rights, constitutional law, and specific statutory schemes for establishing police liability.

By bringing these three important topics together we can better establish how police civil liability works. This is important not only as a training tool, but also as a guide for future use. Knowledge and understanding of the system is a key to surviving a civil lawsuit. This book provides both.